

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

|                            |   |                  |
|----------------------------|---|------------------|
| UNITED STATES OF AMERICA,  | ) |                  |
|                            | ) |                  |
| Plaintiff,                 | ) |                  |
|                            | ) |                  |
| v.                         | ) | Criminal Action  |
|                            | ) | No. 13-10200-GAO |
|                            | ) |                  |
| DZHOKHAR A. TSARNAEV, also | ) |                  |
| known as Jahar Tsarni,     | ) |                  |
|                            | ) |                  |
| Defendant.                 | ) |                  |
|                            | ) |                  |

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.  
UNITED STATES DISTRICT JUDGE

**LOBBY CONFERENCE**

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts 02210  
Wednesday, May 6, 2015  
1:54 p.m.

Marcia G. Patrisso, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
One Courthouse Way, Room 3510  
Boston, Massachusetts 02210  
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Mechanical Steno - Computer-Aided Transcript

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14 On Behalf of the Government

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On Behalf of the Defendant

P R O C E E D I N G S

THE COURT: So I wanted to do this so we could be more efficient with the witness. So tell me -- I don't know who wants to go first -- the scope of the controversy here.

MR. BRUCK: I'm sorry?

THE COURT: I just want to get a sense of the scope of the controversy first.

MR. BRUCK: Right. We are proposing to put in evidence through our correctional expert, and possibly through some government witnesses as well, about the SAMs which we view as responsive to the aggravating factor that the defendant incited others to commit additional acts of violence. Now, I realize they were talking about the boat, but it raises the question will he do it again.

We think we're entitled to show that there is a procedure in place to which the defendant's already subject, the SAMs, which can be renewed indefinitely which would essentially cut him off from the outside world with very, very highly monitored exceptions. The way that is done after conviction is that he will be sent with virtual certainty, which we will explore, to ADX in Colorado where there is a special unit devoted to inmates who are under SAMs who are serving life sentences. And that is, you know, I'm going to say with great confidence, where he'll be sent. And then we want to walk through the specific restrictions on

1 communication. That's the issue. So we think we're entitled  
2 to show -- we've already shown the jury the prison, we've shown  
3 it's an isolated location, which is what those pictures show.  
4 We have been given photographs of the interior, of the cells,  
5 of all the different visuals. We're not going to use any of  
6 that because it doesn't go to the issue of communication.

7 THE COURT: When you say "communication," are you  
8 talking only about communication with people outside the prison  
9 or people within it or both?

10 MR. BRUCK: He's restricted -- well, both. I mean,  
11 he's restricted from communication with other inmates by virtue  
12 of being isolated in a particular unit. We're going to  
13 describe that. We're not going to show it. And then he's  
14 single-celled and so forth. And there will be an  
15 acknowledgment that people talk through the pipe chase and  
16 there is various opportunities for inmates subject to SAMS to  
17 communicate with one another.

18 But the important thing is just that he is cut off --  
19 his mail is very limited and closely scrutinized, his telephone  
20 communication, there is an absolute prohibition on  
21 communication with the news media and visitation, and then  
22 also, contact with other inmates. That is the restriction that  
23 we want to show. That's what the SAMS is. It isn't a general,  
24 you know, set of restrictions on his quality of life; it is a  
25 restriction on communication.

1           So we think we're entitled to show that. That does  
2 not open the door to his quality of life across the board.  
3 What the government sees this as an opportunity for is to  
4 introduce details which are extremely inflammatory which, if  
5 argued by a prosecutor, and we've given the cases, would be  
6 misconduct. You know, the victim is lying on the cold ground  
7 and here he's watching *ESPN* and *ESPN2* and he doesn't have to  
8 pay for it. This is the sort of thing -- I mean, people --  
9 which is so inflammatory and so prejudicial and has so little  
10 relationship to the matter at issue.

11           Now, the government may say, Well, it's not fair  
12 because it is very austere conditions and we're entitled to  
13 show that he'll get to watch, you know, cable television. But  
14 that's not the issue, and the probative value on the matter  
15 that is at issue is so minimal. It's not a security breach  
16 that he's allowed cable television within the discretion of the  
17 prison. We -- if need be, we can -- you know, there is a whole  
18 program statement which we're ready to put into evidence. We  
19 don't need to. We don't want to -- we don't see any reason to  
20 go through every aspect of daily life. We will if we have to.  
21 Television is not listed. It's something which is -- can be  
22 withdrawn across the board in the unit or for an individual  
23 inmate. It is a tool of correctional control. It is also a  
24 way to stave off insanity.

25           We can explore all that if we have to but it's

1 not -- we shouldn't have to. And if we do, I think we're  
2 entitled to begin to show -- we provided an affidavit from an  
3 inmate describing his psychological decline under SAMs at H  
4 Unit. And I think our witness would be entitled to read that.  
5 This is a former warden who ran -- the predecessor at ADX,  
6 Marion, and helped populate ADX when they moved the inmates  
7 from Marion to ADX.

8           So we can go very far afield about all of the sort of  
9 psychological terrors inherent in prolonged isolation at ADX  
10 and the fact that allowing inmates to watch television is  
11 something that in sound correctional management is something  
12 that the prison wants to do. But the inflammatory effect of it  
13 is so great and the relevance to the actual issues -- we are  
14 prepared to constrain our showing very tightly to the question  
15 of -- goes to this location. The jury's already seen the  
16 location. We're not going to show what the cell's like, we're  
17 not going to show what the exercise yard looks like, we're not  
18 going to show what the millions of the bars in the hallways  
19 look like, we're not going to go into the isolation as such,  
20 but we just think there has to be a limiting principle and it  
21 should be one that doesn't impinge on this man's right to a  
22 fair trial. And if there is no limiting principle, I don't  
23 know how we could be kept from going on and on to create the  
24 full picture of what it's like, the psychological decline that  
25 is described by this inmate, Mr. Eyad, was -- occurred when he

1 had television. So what do you make of that? It's just -- I  
2 think we need to keep this focused.

3 THE COURT: Who's -- Mr. Mellin?

4 MR. MELLIN: Your Honor, there's really only one issue  
5 at play now. The jury has to decide between life imprisonment  
6 or the death penalty. Allowing us to explain to them what life  
7 imprisonment will be like for Dzhokhar Tsarnaev, if he goes to  
8 ADX, is very important. The defense had opened saying -- and  
9 this is Mr. Bruck saying, He will be facing a lifetime of  
10 unrelenting punishment. That is what Mr. Bruck said. He went  
11 on to say that he will be severely punished. And then finally,  
12 he comes back to say, "Years and years of punishment, day after  
13 day, while he grows up to face the lonely struggle of dealing  
14 with what he did."

15 Mr. Bruck has created an impression with this jury  
16 that is a false impression, and we have a right to rebut that.  
17 We're not looking to go far afield but we are planning on  
18 talking about the amenities, the privileges, the things that  
19 this individual would be getting if he is at ADX. Mr. Bruck  
20 knows better than anyone it's not even clear right now that  
21 this defendant would necessarily be assigned to ADX. It's  
22 certainly highly likely, but it's not a determination that BOP  
23 has even made yet. But Mr. Bruck wants to go to the most  
24 extreme example, as far as he can go, go as far to the H unit,  
25 which is the most secure unit that BOP has, he wants to leave

1 the impression with the jury that the defendant will be  
2 single-celled, have no contact, he said in his opening, with  
3 the outside world at all, and that is just not true. And we  
4 have a right to show this jury exactly what Mr. Tsarnaev's life  
5 will be like at ADX. That's all we're trying to put forward.

6 THE COURT: What is the process for classifying  
7 someone who is convicted of the offenses this defendant has  
8 been convicted of?

9 MR. MELLIN: The process is the information is sent  
10 down to Texas where they have a central processing area. They  
11 receive the information, they make a recommendation to  
12 Washington, D.C. The person in Washington, D.C., then makes an  
13 ultimate call as to whether or not he will be designated to  
14 ADX.

15 I think we all know that it's incredibly highly,  
16 likely if not certain, that he will be at ADX, but BOP cannot  
17 say that because they have standard procedures that they follow  
18 when it comes to these designations. So they will go through  
19 their process. The recommendation will go to D.C., someone in  
20 Washington will then make the determination if he will be sent  
21 to ADX.

22 MR. WEINREB: May I add something briefly? A couple  
23 of things to keep in mind. Mr. Bruck is saying that  
24 the -- they are about to introduce evidence related entirely to  
25 the SAMs and, therefore, rebuttal should be limited to the



1 issue of communication with the outside world. But we're  
2 entitled to rebut anything the defense has put in, not just  
3 what they happen to be putting in with these witnesses right  
4 here. I think Mr. Bruck had a choice of trying to portray to  
5 the jury a certain image of what life would be like if the  
6 defendant were sentenced to life imprisonment or not. He made  
7 that the centerpiece of his opening statement, no doubt because  
8 so many of the jurors during voir dire expressed the view that  
9 life imprisonment under the conditions that they assume it will  
10 be would potentially be worse for him than a death even if it  
11 took years for it to occur. By putting that in play, by making  
12 it an issue in the case, he's opened the door. So the question  
13 isn't is it responsive to the SAMs testimony, but is it  
14 responsive to the defense case, the defense argument.

15 The second thing: The fact that the defendant may go  
16 to ADX initially is almost certain to go to ADX initially, does  
17 not mean he'll remain there his entire life. ADX has a limited  
18 number of beds, and they need to use that prison for prisoners  
19 who cannot be in the general population: Prisoners who have  
20 killed other prisoners, prisoners who attack guards and for  
21 other reasons. So there is the chance, a -- potentially  
22 not -- it is not unlikely that he will step down and can  
23 continue to step down over time. And as he continues to step  
24 down, everything will change for him.

25 And these are all things that are fair rebuttal not

1 just to the opening statement but to this portion of the case.

2 Another thing that's fair to respond to in this  
3 portion of the case is that SAMs are not forever. The argument  
4 that they can be renewed indefinitely at the discretion of the  
5 attorney general is not true. They're subject to judicial  
6 review and they can be renewed. So the defense is saying once  
7 the government opens the door to a discussion of life in ADX,  
8 then there's no limiting principle, but if the defense is  
9 opening the door, and has already opened the door.

10 THE COURT: Let me start at the last and move  
11 backwards. If the proposition is that the SAM is being in  
12 place, the possibility to communicate and, therefore, incite or  
13 whatever is controlled --

14 MR. BRUCK: Yes.

15 THE COURT: -- then the government should be able to  
16 offer evidence that might lead the jury to conclude that it is  
17 uncertain whether the SAMs will remain in place?

18 MR. BRUCK: Well, sure. But we're entitled to show  
19 that essentially -- that it is the government's call. It's the  
20 FBI and the U.S. Attorney and the Attorney General; it's not  
21 the prison system, it's not some faceless bureaucracy. If they  
22 decide he doesn't need it, great.

23 THE COURT: The SAMs might -- the law and the  
24 structures allow the SAMs to be relieved --

25 MR. BRUCK: Or to put --

1 THE COURT: -- possibly.

2 MR. BRUCK: Or it expires every year and has to be  
3 renewed. So that's built in. Sure. We'll cover that.

4 THE COURT: So I don't think that's a problem.

5 Whether the defense evidence -- putting aside the  
6 opening for now, just the evidence -- permits a wider  
7 discussion of BOP regulations generally, including the steps, I  
8 think is a closer question, and it may depend on what we  
9 actually hear in the defense direct testimony. I can conceive  
10 of circumstances where it might invite a clarification, if  
11 that's what you think it is, by greater detail about the  
12 opportunities that are afforded to step down when the SAMs are  
13 removed. So that I put in the middle ground.

14 I don't think you're entitled now to rebut the opening  
15 where there is no evidence in support of the opening. We tell  
16 the jurors that that's not evidence. You may have had an  
17 opportunity to do it in your direct case when it was right  
18 after the opening, but I think now that we're in the defense  
19 case, I don't think it's proper rebuttal to the defense case to  
20 address not evidence but opening statements. Whether in your  
21 rebuttal case you have that opportunity again, I don't know. I  
22 think probably not, but that may be an opening.

23 So the fact that we're talking about the prisons and  
24 the comparison you're talking about, I think it seems to me to  
25 be maybe an unsettled issue under the statute whether just

1 general evidence about how life in prison is for an inmate is  
2 relevant under 3593(c). I think there's a good argument that  
3 it is, but I don't think the way this case has proceeded it  
4 should be produced only in response to limited defense evidence  
5 about the SAMs.

6 MR. MELLIN: Your Honor, can I say in response --

7 THE COURT: So -- but, again, you have to be careful  
8 because --

9 MR. BRUCK: I will. And I'll need to confer with my  
10 witness one more time.

11 MR. MELLIN: Your Honor, the concern that we have is  
12 that given the opening, we had to decide when we could rebut  
13 that appropriately. We did not allege future dangerousness.  
14 And so we have to make the right determination, which is we  
15 could not in our case-in-chief put forth this information  
16 because we didn't allege future dangerousness. It's only the  
17 statements of Mr. --

18 THE COURT: Well, I guess -- I'm not sure you couldn't  
19 have, but that's -- you'd have to strategize --

20 MR. MELLIN: It's fraught with danger.

21 MR. WEINREB: Frankly, we also dispute that the  
22 government alleged anything that makes any of this information  
23 relevant. And so what's happening here --

24 THE COURT: Well, it's a mitigating factor, though,  
25 that they've suggested. They've affirmatively proposed that

1 they should rest easy he can't be --

2 MR. WEINREB: Yes, but I think the cases that talk  
3 about what is and is not proper mitigating evidence allow the  
4 defense to allege lack of future dangerousness as a mitigation  
5 factor only insofar as it relates to the defendant's character  
6 that he's a peaceful person, he's not the kind of person who is  
7 violent; not the ability of the prison system to secure  
8 prisoners, because that applies to everybody equally. And the  
9 whole point of the Federal Death Penalty Act and the whole  
10 system that the Supreme Court has mandated is to figure out  
11 ways to distinguish murderers who deserve the death penalty  
12 from those who don't. All of them are going to encounter the  
13 same level of security, so it can only be their characters that  
14 distinguish them one from the other.

15 MR. MELLIN: And the cases that --

16 MR. WEINREB: I'm sorry. I'm not finished. One more  
17 thing I want to add, which is the combination of the opening  
18 statement and now, where we were told that this would be a  
19 bleak existence with nothing to do but sit around and stare at  
20 four walls and think about your crimes for the rest of your  
21 days, which is precisely what many of the jurors during voir  
22 dire said that they would rather see him do than get the death  
23 penalty, is what Mr. Bruck is going to try to convince the  
24 jurors through this testimony is going to happen, because he's  
25 going to say he's going to be cut off with all communication

1 from the outside world. He will lead a lonely existence where  
2 he does nothing but sit around and stare at the wall.

3 And that is so misleading and so -- it will  
4 simply -- I mean, it could literally lead jurors to make a  
5 different decision in this case than they would make if they  
6 knew the truth, and it's not the truth.

7 THE COURT: Well, that's all premised on the  
8 immutability of the SAMs, though, which you could counter.

9 MR. WEINREB: No, but he's not staring at the four  
10 walls; he's staring at a color television all his days. That's  
11 what they're trying to do. That's the misleading picture  
12 they're trying to --

13 MR. MELLIN: Mr. Bruck says there's a place so secure  
14 that he won't even be able to glimpse the outside world; all  
15 you could see from the narrow cell -- from the small, one-man  
16 exercise cage is a patch of sky. That's not a true impression  
17 of what ADX is like.

18 And so we have the right to rebut these claims that  
19 create false impressions. That's all we're trying to do, your  
20 Honor, is respond to his opening statement. And we understand  
21 the cases that Mr. Bruck is talking about where there is a link  
22 drawn between the defendant's day in the life versus Martin  
23 Richard. No one is going to argue that. No one is getting  
24 close to that. The point is to clarify for the jury exactly  
25 what is the determination they're making. They're making a

1 determination between life in prison or the death penalty, and  
2 when they're deciding that, they have the right -- and  
3 especially given his opening, they have a right to know what  
4 really life imprisonment is for each of these individuals.

5 MR. WEINREB: They shouldn't have a misimpression,  
6 they shouldn't be making the decision based on a lie.

7 MR. BRUCK: I have a response to every point that has  
8 made, but I generally follow the practice of not arguing when  
9 the Court has ruled provisionally in our favor. So if the  
10 Court wants to hear further argument, I've got it, but I'm  
11 inclined not to prolong this unduly.

12 The opening statement was factual. It was -- what was  
13 being talked about was the fact of that a life sentence. He  
14 would have his lifetime --

15 THE COURT: Well, no. I think it was pretty emphatic.  
16 I mean, I agree generally with the characterization of it --

17 MR. BRUCK: It is also not evidence, and we are not  
18 putting in evidence that does anything more than what we've  
19 described, which is the limitations on communications. They  
20 are not absolute limitations; they are restrictions. There is  
21 family phones, family visiting. All of that is going to be  
22 discussed.

23 MR. WEINREB: The opening statement is the roadmap of  
24 the evidence they're going to see. Here comes the evidence,  
25 and they will take that as proof of what was argued in the

1 opening statement unless we have a chance to rebut it. That's  
2 the problem. What the opening statement was not: He won't be  
3 a danger to people in the outside world. If it were limited to  
4 that, that would be a different story, but it wasn't about that  
5 at all. It was about the thing that Mr. Bruck knew the jurors  
6 cared about and it was intended to create a misimpression, and  
7 that's what it will do if this evidence goes in unrebutted.

8 MR. MELLIN: And, your Honor, I don't think there's a  
9 case out there that says that we're not entitled to bring out  
10 this information about what privileges that someone would have  
11 or anything along those lines. You can't bring it out to make  
12 that link. We're not going to make any link.

13 THE COURT: Well, I mean, part of this is just normal  
14 trial sequencing, and I think that probably would have been  
15 appropriate, probably. I don't have to rule because we're past  
16 that point in your presentation to --

17 MR. WEINREB: Well, we could do it in our rebuttal  
18 case.

19 THE COURT: I'll reserve that possibility.

20 MR. WEINREB: Yeah. I mean, we're willing to do that.

21 THE COURT: I don't know. Let's see what this is  
22 like. But today, with the defense witness, you can show that  
23 the SAMs are not immutable, that the premise on which the  
24 reassurance depends, is questionable; and, therefore, they  
25 should be careful of drawing the conclusion. I mean, you could



1 do all of that with respect to the SAMs without getting into  
2 general classification conditions and so on and so forth. I'll  
3 think further about whether that's an appropriate rebuttal  
4 matter.

5 MR. MELLIN: The concern I have there, your Honor, is  
6 that this defendant, even if he goes to ADX, will be able to  
7 step down even in ADX. So there will be more communications he  
8 could have, things along those lines. So I just want to make  
9 sure that I understand where the Court is coming out on that.

10 THE COURT: Well, I think -- if the premise -- I think  
11 it's fair for the jury to understand the significance of the  
12 lifting of the SAMs. As I understand it, one of the  
13 significances of the lifting of the SAMs is it opens the  
14 possibility of an administrative adjustment farther -- or wider  
15 than it would if the SAMs remained in place.

16 MR. MELLIN: Correct.

17 THE COURT: And so I think that's legitimate.

18 MR. MELLIN: Which will increase his communications  
19 abilities and all --

20 THE COURT: I think that's legitimate.

21 MR. BRUCK: Of course, we'll bring out that would be a  
22 problem of the government's own making because they have the  
23 ability to keep the SAMs in place. And the business of the  
24 court -- there has never been a court that has limited the  
25 SAMs. There has been one court order requiring the FBI to

1 reconsider a limitation on communication, on mail, or  
2 visitation, which the FBI was not required to do and didn't do,  
3 and that's the extent of the judicial review in the entire  
4 history of the program.

5 So this idea that courts can -- we asked for discovery  
6 from the government, and I've received no response on any court  
7 order that has lifted the SAMs from an inmate.

8 MR. WEINREB: The problem is that just like when it  
9 comes to, let's say, wiretap warrants, we don't seek them if we  
10 don't see there's probable cause to seek them. The government  
11 doesn't seek to renew SAMs when it believes that it can no  
12 longer justify the need for their existence. That's how they  
13 get lifted for the most part.

14 We have one other issue, which the defense made a  
15 request for several BOP witnesses. We have supplied them. One  
16 of them, we informed them, had personal issues, family issues.  
17 She needed to testify yesterday and then leave. We kept her  
18 around for another day because of the delays that occurred with  
19 the Russian witnesses. If she does not testify today, she  
20 needs to leave.

21 THE COURT: Who is she?

22 MR. MELLIN: Michelle Nicolet.

23 MR. BRUCK: We'll know after Mr. Bezy if we need her.

24 MR. MELLIN: The list we got last night had Michelle  
25 Nicolet listed before Mr. Bezy.

1 THE COURT: What's her contribution?

2 MR. MELLIN: She is the chief for the FBI overseeing  
3 the SAMs determination. So she would be able to explain the  
4 SAMs program and how it --

5 THE COURT: Let's get going.

6 MS. CLARKE: I think we'd better get going. We could  
7 take it up at sidebar?

8 THE COURT: What?

9 MS. CLARKE: I just had other things to do.

10 THE COURT: No, let's do this thing.

11 (The proceedings adjourned at 2:18 p.m.)  
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## C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso  
MARCIA G. PATRISSE, RMR, CRR  
Official Court Reporter

Date: 2/1/16